

## **Khan (Migration) [2018] AATA 2977 (3 July 2018)**

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### **DECISION RECORD**

|                           |                                                                                                 |
|---------------------------|-------------------------------------------------------------------------------------------------|
| <b>DIVISION:</b>          | Migration & Refugee Division                                                                    |
| <b>REVIEW APPLICANT:</b>  | Mr Mohammad Khan                                                                                |
| <b>VISA APPLICANT:</b>    | Mr Wajid Haidar Khan                                                                            |
| <b>CASE NUMBER:</b>       | 1609342                                                                                         |
| <b>DIBP REFERENCE(S):</b> | 2013/021621                                                                                     |
| <b>MEMBER:</b>            | Kira Raif                                                                                       |
| <b>DATE:</b>              | 3 July 2018                                                                                     |
| <b>PLACE OF DECISION:</b> | Sydney                                                                                          |
| <b>DECISION:</b>          | The Tribunal affirms the decision not to grant the applicant a Child (Migrant) (Class AH) visa. |

Statement made on 03 July 2018 at 12:48pm

### **CATCHWORDS**

Migration – Child (Migrant) (Class AH) visa – Bogus document – Afghan tazkera non-genuine – Not registered with the relevant Afghan authority – No probative documents of visa applicant's identity – No compassionate or compelling circumstances affecting Australian citizen, Australian permanent resident, or eligible New Zealand citizen – Decision under review affirmed

### **LEGISLATION**

*Migration Act 1958*, ss 65, 359A

*Migration Regulations 1994*, Schedule 2, r 1.03, cl 117.223, Public Interest Criterion 4020

### **CASES**

3. *Arora v MIBP* [2016] FCAFC 35
4. *Batra v MIAC* [2013] FCA 274
5. *Kaur v MIBP* [2017] FCAFC 184
6. *Plaintiff M64/2015 v MIBP* [2015] HCA 50
7. *Trivedi v MIBP* [2014] FCAFC 42

### **STATEMENT OF DECISION AND REASONS**

#### **Application for review**

8. This is an application for review of a decision made by a delegate of the Minister for Immigration on 28 April 2016 to refuse to grant the applicant a Child (Migrant) (Class AH) visa under s.65 of the *Migration Act 1958* (the Act).

9. The applicant is a national of Afghanistan, born in December 1997. He applied for the visa on 28 August 2013. The delegate refused to grant the visa on the basis that the applicant did not satisfy the requirements of cl.117.223 of Schedule 2 to the Migration Regulations 1994 (the Regulations) because the delegate was not satisfied the applicant met Public Interest Criterion (PIC) 4020. The sponsor ('the review applicant') seeks review of the delegate's decision.
10. The review applicant appeared before the Tribunal on 28 March 2018 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Pashto and English languages. The review applicant was represented in relation to the review. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

### **Relevant law**

11. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl.117.223 for the grant of the visa. Broadly speaking, this requires that:
  - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and
  - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and
  - the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and
  - neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).
12. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver does not apply to the identity requirements in PIC 4020(2A) and (2B).
13. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in s.5(1) of the Act. In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.
14. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by

the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.

15. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.

**Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in material particular?**

16. The review applicant provided to the Tribunal a copy of the primary decision record. It indicates that as evidence of his identity, the visa applicant submitted a handwritten passport and an Afghan tazkera No 534235. The primary decision record notes that the preliminary document checks identified concerns with the document and the visa applicant was invited to explain how he obtained the tazkera. The decision record states that the visa applicant did not appear to have any knowledge of how the document was obtained. The Department initiated the verification check with the issuing authorities in Afghanistan. On 29 October 2015 the Department was advised that the Afghan tazkera No 534235 was a non-genuine document as it was not registered with the relevant Afghan authority and was found to be made fraudulently. It is stated that the passport was confirmed as being registered with the Afghani authorities.
17. In November 2015 the delegate wrote to the visa applicant seeking his comments on the above information. The visa applicant provided a declaration from the sponsor who claims that his brother assisted the family to obtain the tazkera in Peshawar and they believed it to be genuine but they have 'no idea'. The sponsor stated that it is not possible for the applicant to return to Afghanistan to obtain any other form of identification. The sponsor stated that the visa applicant's passport was not issued in Kabul but at the Central Passport office at the Afghan Embassy in Peshawar and there is no reason to believe it is not genuine. The sponsor stated that the visa applicant is his brother's son and he is willing to do DNA tests to prove the relationship. The representative's submission addresses the issue of the waiver but the delegate noted that the waiver did not apply in relation to PIC 4020(2A).
18. In his written statement to the Tribunal the review applicant states that his brother in good faith obtained the passport and tazkera for the visa applicant from the Afghan Embassy in Quetta and did not realise the document was not valid. The review applicant refers to the country information regarding Pakistan and claims he is worried about his nephew's safety. The review applicant provided a number of media reports relating to the safety situation. In oral evidence the review applicant explained that the visa applicant could not return to his home country because it is a dangerous place and they paid someone else to help them get the tazkera. The review applicant states that his nephew is not at fault. The Tribunal acknowledges that evidence but is mindful that it is not necessary to establish the visa applicant's involvement in obtaining the bogus document.
19. The primary decision record indicates that the Department's inquiries indicate the tazkera which the visa applicant produced with the application was not registered with the relevant authority and was found to be a fraudulent document. The review applicant explains how the tazkera was obtained, and while the Tribunal is prepared to accept for the purpose of this decision that the visa applicant may not have been involved in falsifying the document, the Tribunal nevertheless finds that the document is a bogus document because it purports to have been, but was not, issued in respect of the person or because it is counterfeit or has been altered by a person who does not have authority to do so.

20. The Tribunal finds that there is evidence before the Tribunal that the applicant has given, or caused to be given, to the Minister or an officer. The Tribunal finds that the visa applicant does not meet PIC 4020(1).

**Should the requirements of PIC 4020(1) or (2) be waived?**

21. The requirements of PIC 4020(1) and (2) may be waived where there are compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in r.1.03), that justify the granting of the visa. The decision-maker must first be satisfied that there are such circumstances, then must consider whether to exercise the discretion to waive the requirements, having regard to those circumstances: *Kaur v MIBP* [2017] FCAFC 184.
22. The expressions 'compelling circumstances' and 'compassionate or compelling circumstances' are not defined for these purposes. To be compelling, the circumstances must force or drive the decision-maker irresistibly to be satisfied: see *Plaintiff M64/2015 v MIBP* [2015] HCA 50. The ordinary meaning of 'compassionate' relates to feelings of sympathy, sorrow, pity or concern for others.
23. The Tribunal has found that the visa applicant provided a bogus document with his application and that PIC 4020(1) applies.
24. With respect to the waiver, the review applicant states that he is concerned about the safety situation in Pakistan and while the Tribunal acknowledges that evidence, the Tribunal is mindful that it appears to affect the visa applicant and not an Australian citizen or permanent resident.
25. The review applicant also provided to the Tribunal a number of medical reports. There is a report from Delta Psychology Australia relating to Ms Fiza Khan. The Tribunal has considerable concerns that the clinical psychologist who prepared this report and who identifies Ms Khan as suffering from major depressive disorder, saw her on 9 and 16 January 2018, that is, shortly before the matter was heard by the Tribunal. It appears that having had the visa application refused, the review applicant decided that a medical report would be helpful to their case and consulted a psychologist for that reason.
26. Nevertheless, the Tribunal acknowledges that the psychologist has formed the view that Ms Khan suffers from a major depressive disorder. There are other medical reports from Zeitz Consulting and Back2Work Health Specialists, as well as the report from Dr Adzanku.
27. The Tribunal accepts that Ms Khan suffers from a number of serious medical conditions. The review applicant's evidence to the Tribunal is that the visa applicant's parents were killed when he was young and his wife brought him up and considers him to be her own child. The review applicant says they cry when they speak to each other and his wife suffers from mental illness as a result. The review applicant also told the Tribunal that the visa applicant is a young boy and has nobody to look after him and cannot look after himself. The review applicant states that if others knew about his circumstances and family in Australia, he could be kidnapped and that would create problems for the family here. The Tribunal accepts that the review applicant is concerned about the visa applicant's safety and such concerns affect his health and well-being.
28. The Tribunal accepts, on balance, that the visa applicant's situation is causing distress to the review applicant and the family in Australia. The Tribunal accepts, having regard to the medical evidence, that the sponsor's partner is suffering from a serious medical condition and that condition is exacerbated by her concern for the visa applicant, who she considers to

be her child. The Tribunal is satisfied there are compassionate circumstances affecting the interests of an Australian citizen or permanent resident. In the Tribunal's view, these circumstances justify the grant of the visa. The Tribunal is satisfied that the requirements should be waived.

#### **Has the applicant satisfied the identity requirements?**

29. PIC 4020(2A) requires an applicant satisfy the Tribunal as to his or her identity. The delegate found that since the applicant's tazkera was not a genuine document and the passport was obtained on the basis of that document. As a result, the delegate was not satisfied of the applicant's identity. As the first tazkera was found to be a bogus document, and the passport was issued on the basis of the bogus document, the Tribunal does not consider that these documents establish the visa applicant's identity.
30. The review applicant provided to the Tribunal new identity documents relating to the visa applicant. The Tribunal had arranged for these to be verified through the overseas post. On 14 June 2018 the Tribunal received advice that the identity cards issued in 2017 'beyond the national identity verification centre' are not valid because such cards were issued in the absence of the person. The Tribunal wrote to the review applicant pursuant to s. 359A of the Act seeking his comments on this information but the applicant failed to respond within the prescribed period.
31. The Tribunal finds the identity documents relating to the visa applicant to be problematic. The initial tazkera that was submitted as proof of identity with the primary application was found to have been a bogus document and the subsequent identity document submitted to the Tribunal is considered by the local authorities not to be a valid document. Essentially, there are no probative documents before the Tribunal in relation to the visa applicant's identity and the Tribunal finds the presented documents unreliable as evidence of the visa applicant's identity.
32. On the evidence before it, the Tribunal is not satisfied as to the visa applicant's identity. The Tribunal finds that the applicant does not meet PIC 4020(2A). The visa applicant does not satisfy PIC 4020 for the purposes of cl.117.223.

#### **DECISION**

33. The Tribunal affirms the decision not to grant the applicant a Child (Migrant) (Class AH) visa.

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Kira Raif  
Senior Member